

# Fordham Law Review

---

Volume 4 | Issue 1

Article 2

---

1935

## Some Recent Developments in the Law Relating to Municipal Financing of Public Works

E. H. Foley, Jr.

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

 Part of the [Law Commons](#)

---

### Recommended Citation

E. H. Foley, Jr., *Some Recent Developments in the Law Relating to Municipal Financing of Public Works*, 4 Fordham L. Rev. 13 (1935).

Available at: <https://ir.lawnet.fordham.edu/flr/vol4/iss1/2>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## Some Recent Developments in the Law Relating to Municipal Financing of Public Works

### Cover Page Footnote

Director, Legal Division, Federal Emergency Administration of Public Works. This article is largely based on an address delivered by the author before the Municipal Corporations section of the American Bar Association at its annual meeting at Milwaukee, Wisconsin, August 27, 1934.

# SOME RECENT DEVELOPMENTS IN THE LAW RELATING TO MUNICIPAL FINANCING OF PUBLIC WORKS

E. H. FOLEY, JR.†

THREE billion, three hundred million dollars were appropriated by the Seventy-third Congress to provide for the construction of useful public works.<sup>1</sup> In June, 1934, a revolving fund was created by authorizing the sale to the Reconstruction Finance Corporation of securities acquired by the Federal Emergency Administration of Public Works,<sup>2</sup> and in addition four hundred million dollars more were made available for public works.<sup>3</sup>

Of the three billion seven hundred million dollars made available to the Public Works Administration, over one billion dollars were allotted for non-federal projects up to November 1, 1934. Included in this sum are loans of two hundred million dollars made to railroads for maintenance and equipment and to private corporations for special purposes, and the sum of one hundred million dollars reserved for low-cost housing and slum clearance projects. The remaining seven hundred millions have been allotted by way of loans and grants to states, counties, municipalities and other public bodies.

States and their political subdivisions submitted more than nine thousand applications seeking approximately four and one-half billion dollars from the federal government to aid in the financing of their public works projects. This superabundance of applications made it possible for the Administrator<sup>4</sup> to include in the comprehensive program of public works only those projects which, after a thorough consideration of their technical, economic and legal soundness, were found acceptable by the Engineering, Finance and Legal Divisions of the Public Works Administration. On the first of November, 1934, the Legal Division had examined 7,126 applications,<sup>5</sup> had approved 6,590, had written

---

†Director, Legal Division, Federal Emergency Administration of Public Works. This article is largely based on an address delivered by the author before the Municipal Corporations Section of the American Bar Association at its annual meeting at Milwaukee, Wisconsin, August 27, 1934.

1. P. L. No. 67, 73d Cong., 1st Sess. (1933).
2. P. L. No. 412, 73d Cong., 2d Sess. (1934).
3. Four hundred million dollars were made available by President Roosevelt pursuant to P. L. No. 412, 73d Cong., 2d Sess. (1934).
4. By EXEC. ORDER No. 6198, July 8, 1933, President Roosevelt designated Harold L. Ickes as Federal Emergency Administrator of Public Works.
5. This figure includes applications for grants only as well as those for grants together

contracts covering 4,002 projects, and had closed more than 900 municipal loans after approving in each case the bond transcript of proceedings, as well as all the other legal steps taken in connection with the authorization, financing and construction of the projects.

From the state of New York alone more than 425 applications were submitted by cities, villages, counties, towns, districts, authorities and the state itself. By November 1, 1934, 253 of these applications had been approved, contracts covering more than 248 projects had been executed and more than 85 of these were actually under construction.<sup>6</sup>

When the public works program was inaugurated, the procedure for financing local public improvements in many states was cumbersome and unsatisfactory. Laws relating to the power of non-federal governmental agencies to borrow money for public works projects were in many instances unsettled or doubtful. An analysis of the legislation delegating to municipal corporations and other public bodies powers to construct and finance public works and removing procedural obstructions as well as of cases instituted to clarify or settle doubtful constitutional or statutory difficulties forms the basis for this discussion.

### *New State Legislation*

Oftentimes the history of legislation is the record of the response to the needs of particular situations.<sup>7</sup> This has been again demonstrated

---

with loans. An applicant may be able to finance a project in whole or in part otherwise than by a sale of its obligations to the United States and wishes nevertheless to obtain a grant. In such a case the grant (30 per centum of the cost of the labor and materials employed upon the project) is made if the project is approved by the Administrator and the applicant enters into an agreement with the United States whereby all work on the project is done subject to the rules and regulations adopted by the Administrator to carry out the purposes and control the administration of the Act. Agreements providing for a loan and grant contain a provision that, in the event the obligations which the United States agrees to purchase are sold to a purchaser other than the Government, the United States will nevertheless make a grant of 30 per centum of the cost of the labor and materials employed upon the project.

6. A few of the larger projects in the State of New York are: Tri-Borough Bridge Authority, \$44,200,000 (Toll Bridge); Port of New York Authority, \$37,500,000 (Tunnel); City of New York, \$23,160,000 (Subway), \$4,000,000 (Garbage Disposal), \$3,830,000 (Hospital), \$2,500,000 (School), \$2,268,500 (Schools), \$1,193,000 (Pier Sheds), \$1,198,300 (Health Buildings), \$1,868,000 (Disposal Plant), \$1,148,000 (Hospital), \$1,110,800 (High School), \$1,101,000 (High School), \$1,013,000 (Waterworks), \$1,000,000 (Water Mains), \$25,245,000 (Ward's Island Sewage Treatment Works, application pending); Erie County, \$3,101,333 (Highway); St. Lawrence Bridge Commission, \$2,800,000 (Ogdensburg Toll Bridge); Westchester County, \$2,085,000 (Sanitary Sewers), \$1,825,000 (Court House); Rochester, \$1,490,000 (School); Buffalo, \$1,429,000 (Storm Sewer), \$1,198,900 (High School), \$1,148,370 (Storm Sewers); Utica, \$1,295,000 (Schools); Jamestown, \$1,222,000 (School).

7. For example: An Act to Regulate Public Warehouses and the Warehousing and

by the experience of PWA during the last eighteen months. Many municipalities were entangled in a network of limitations and found themselves without powers sufficiently extensive to enable them to secure the benefits of the National Industrial Recovery Act. States alert to the exigencies of the times recognized that legal machinery which had served adequately for decades could not be adjusted to the high speed with which the federal government was capable of extending credit at a time when speed was essential to obtain the results desired by both the federal and local governments. The need was at once apparent for a revision of the statutes authorizing and regulating municipal financing.

In states where constitutions are long statute-like documents of detail rather than bills of rights and short statements of fundamental principles, the outlook was discouraging both to lawyers and legislators. The southern states particularly, in a laudable attempt to prevent a recurrence of the wildcat public financing of the post Civil War days, had sought by constitutional amendment to protect taxpayers from outlandish extravagances. These states now found themselves in a condition of legal paralysis. The credit of Georgia and of its cities and towns stands almost unparalleled, and yet, because of the zeal of its Constitutional Convention of 1877 in limiting the power of the state and its municipalities to borrow money, this state and its municipalities have been prevented from participating in the benefits of the national program of public works on the same footing with other borrowers.

The situation was more encouraging in other parts of the country. Legislatures not hampered by constitutional restrictions were convened in extraordinary session to enact laws, many of which were drafted with the cooperation of PWA, to simplify the procedure for the authorization

---

Inspection of Grain, adopted by the Illinois Legislature to correct abuses in the business of storing and inspecting grain in Chicago, Ill. Laws 1871-2, p. 762; *Munn v. Illinois*, 94 U. S. 113 (1876); The Packers and Stockyards Act, to correct deplorable conditions in the packing industry, 42 STAT. 159 (1921); The District of Columbia rent laws, adopted by Congress to meet the housing problem resulting from conditions created by the World War, 41 STAT. 297, 304 (1919); *Block v. Hirsch*, 256 U. S. 135 (1921); The Court of Industrial Relations Act of Kansas, adopted for the purpose of insuring continuity of operation in coal mining and other businesses after the wide-spread strike of coal miners in 1919, Kan. Laws Spec. Sess. 1920, c. 29; *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522 (1923); The Minnesota Mortgage Moratorium Law, adopted in 1933 to afford temporary relief to mortgagors oppressed by "the severe financial and economic depression existing for several years past," Minn. Laws 1933, p. 514; *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U. S. 398 (1934). The statement in the text is implicit in the rule for construing remedial legislation: "There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided for the mischief." 1 BL. COMM. \* 87, CO. LITT. 11, 42.

and financing of public improvements and to remove time-consuming impediments.

Laws which required a long period of notice before elections, public hearings or bond sales could be held, were either suspended or modified in order to permit municipalities to borrow money without delay so that construction of projects might begin quickly. In some instances a desire to accomplish too much resulted in almost complete frustration. In New York State, for example, a statute declared that all laws which tended to prevent municipalities from taking advantage of the provisions of the National Industrial Recovery Act should be inoperative.<sup>8</sup> This hastily conceived statute was so ambiguous and so indefinite that its application to a particular case frequently could not be determined. Another instance was an act passed by the New Jersey Legislature<sup>9</sup> containing a provision that municipalities operating under it could borrow from the federal government an amount not to exceed seventy per cent of the total cost of a given project, failing to take into account the fact that the discretion of the Administrator was limited, in making grants under the National Industrial Recovery Act, to an amount not exceeding thirty per cent of the cost of only the labor and materials employed in the construction of a project.<sup>10</sup> Both of these acts created difficult situations. After valuable time had been consumed the New Jersey Act was repealed<sup>11</sup> and the New York Act thoroughly revised.<sup>12</sup> A substitute New Jersey Act,<sup>13</sup> and the revised New York Act, now assist materially the political subdivisions of those states in participating in the recovery program. When representatives of the state of New Mexico consulted the officials of PWA as to ways and means of simplifying the procedure for the financing and construction of public works in that state, the experience of New York and New Jersey was drawn upon with the result that a workable bill was prepared with no loss of time and was enacted into law at a special session called for that purpose.<sup>14</sup>

Additional statutes which had as their primary purpose the conferring of further powers upon municipal corporations, as distinguished from the elimination of procedural restrictions, were passed by the legislatures of many states. Such laws were necessary in states where limitations had been imposed upon the character of public improvements which municipalities might undertake, and the mode of financing these im-

---

8. Laws of New York, 1933, c. 782.

9. N. J. Pamph. Laws, 1933, c. 328.

10. P. L. No. 67, 73d Cong., 1st Sess. (1933) § 203 (a) (2).

11. N. J. Pamph. Laws, 1933, c. 416.

12. Laws of New York, 1934, c. 104.

13. N. J. Pamph. Laws, 1933, c. 428.

14. N. M. Sess. Laws Spec. Sess. 1934, c. 6.

provements. This type of legislation removed statutory limitations upon debt-incurring power, delegated broad authority to municipal officials to make such contracts with purchasers of bonds as were deemed to be in the best interests of municipalities, provided that bonds might be issued notwithstanding any limitations prescribed by other laws and frequently fixed the procedure for the issuance of bonds so that it was not necessary to conform such procedure to the provisions of existing statutes. The commonwealth of Virginia led the way in this type of legislation;<sup>15</sup> followed closely by Delaware,<sup>16</sup> and Maryland.<sup>17</sup> The state of Colorado went so far as to authorize the issuance of bonds by cities and villages without regard to any of the limitations or restrictions contained in her constitution.<sup>18</sup> The Colorado Act, not unlike Section 203 (d) of the Recovery Act,<sup>19</sup> might be referred to as "A Legislator's Prayer."<sup>20</sup>

The legislation enacted in Virginia, Delaware and Maryland was couched in terms of a general bond code, the operation of which was limited to a period of two or three years. In some of the New England states the exercise of the broad powers conferred by similar legislation is made dependent upon the approval of a state supervising authority. In New Hampshire the consent of the Governor and Council is necessary;<sup>21</sup> in Rhode Island the consent of the Emergency Public Works Commission<sup>22</sup> and in Massachusetts the consent of the Emergency Finance Board.<sup>23</sup> Time which might otherwise be gained through the removal of procedural restraints by these acts is more than off-set by the delay occasioned by these supervisory commissions in investigation and review which in a large measure duplicates, step by step, the investigation and review by the federal organizations set up in these states by PWA.<sup>24</sup> The centralization of power over municipal financing has,

---

15. Va. Acts Extra Sess. 1933, c. 26. Constitutionality sustained, *Nelson v. Town of Culpepper*, decided by Circuit Court of Culpepper County, *appeal refused*, Supreme Court of Appeals, (unreported) 1934.

16. Del. 2d Spec. Sess. Gen. Assembly, H. B. No. 3, approved Dec. 14, 1933.

17. Md. Laws Extra Sess. 1933, c. 30.

18. Colo. Laws Extra Sess. 1933, c. 16.

19. P. L. No. 67, 73d Cong., 1st Sess. (1933) § 203(d): "The President, in his discretion, and under such terms as he may prescribe, may extend any of the benefits of this title to any state, county or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such state, county or municipality to borrow money or incur indebtedness."

20. Legis. (1934) 47 HARV. L. REV. 688, 690: "Only a prayer can accompany such legislation."

21. N. H. P. L. 1933, c. 162.

22. R. I. P. L. June Sess. 1933, c. 2078.

23. Mass. Acts 1933, c. 49.

24. For a summary of the organization of PWA, see Coyle, *Public Works and the PWA*, (1934) 112 ENGIN. NEWS REC. 181.

however, compensatory features when placed in the hands of experienced, impartial and far-sighted officials of the state.<sup>25</sup>

*Development of the "Authority"*

Another result of legislation enacted to assist in the present program of public works is the development of the so-called "authority" as an instrumentality of government. Probably the best known authority is the Port of New York Authority. This Authority came into existence in 1921 as the result of a compact between the states of New York and New Jersey, approved by joint resolution of Congress.<sup>26</sup> Its purpose was to develop the Port of New York and to coordinate the terminal, transportation and other facilities of commerce in the territory surrounding New York harbor. Power was conferred to build bridges, tunnels and terminals. Income derived from the use of such facilities was pledged to pay the indebtedness incurred for their construction.

The development of the idea of the authority raises this interesting question: Can a state empower such a body to incur a debt which will not be held to be that of the state itself? The present Chief Justice of the United States before he returned to the Supreme Court Bench was asked for an opinion upon the questions relating to the validity of the organization of the Port of New York Authority, its power and immunities and the status of bonds proposed at that time to be issued by the Authority for the construction of certain bridges.<sup>27</sup> In the course of his opinion he summarized with apparent approval an opinion of the Attorney General of New Jersey<sup>28</sup> holding that the Port Authority was a municipal corporate instrumentality of the states of New York and New Jersey, and as such was legally a proper body to receive appropriations made by the New Jersey Legislature for its legitimate purposes; that the legislature could make a definite appropriation to the objects of an instrumentality of the states; that there was no requirement that the money appropriated be actually in hand; and that, should an appropriation be

---

25. Such as the Local Government Commission of North Carolina, N. C. P. L. 1931, c. 60. See also the Municipal Finance Commission of New Jersey, N. J. Pamph. Laws 1931, c. 340, particularly as amended by N. J. Pamph. Laws 1932, c. 236 and N. J. Pamph. Laws 1933, c. 330, and as supplemented by N. J. Pamph. Laws 1933, c. 331. Constitutionality sustained, *Hourigan v. North Bergen Tp.*, 172 Atl. 193 (N. J. 1934).

26. Laws of New York, 1921, c. 154; N. J. Pamph. Laws 1921, c. 151; 42 STAT. 174 (1921); Laws of New York, 1922, c. 43; N. J. Pamph. Laws 1922, c. 9; 42 STAT. 822 (1922).

27. Opinion of Hon. Charles Evans Hughes to Hon. Julian A. Gregory, Chairman, Port of New York Authority, dated Nov. 10, 1925. See Laws of New York, 1924, c. 230; N. J. Pamph. Laws 1924, c. 125; Laws of New York, 1924, c. 186; N. J. Pamph. Laws 1924, c. 149; 43 STAT. 1094 (1925).

28. Opinion, Att'y Gen., N. J. (Mar. 5, 1925).



made, no debt or liability of the state would be incurred, nor would such an appropriation constitute a lending of the credit of the state within the prohibition of the New Jersey constitution.

Except in connection with the legislative appropriations, neither the opinion of the Chief Justice nor the opinion of the Attorney General discusses the question whether or not the bonds of the Authority constitute a debt of either state. Undoubtedly the point was not more fully considered in these opinions because of the well-settled principle of law that a public corporation may be created as a distinct legal entity apart from the state creating it, the debts of which are the debts of the corporation and not debts of the state. One possible limitation is that if the corporation mortgages property belonging to the state as security for a loan to the corporation a debt of the state is created. Application of this limitation is found in a recent opinion of the Justices of the Supreme Court of Rhode Island in reviewing legislation enacted to permit a corporation constituted as an entity, separate from the state, to obtain a loan from PWA.<sup>29</sup> The corporation had been formed with the Governor, Commissioner of Finance, and the Chairman of the State House and Senate Finance Committees as its officers. All of the stock of the corporation, which consisted of one share of no-par value, was issued to the state. The articles of association of the corporation expressly declared that the corporation "shall have no power to incur state debts but only debts of itself as a separate corporate entity." The act also authorized the corporation to pledge or transfer title of property of the state as security for the payment of amounts due the federal government. In an advisory opinion the Justices of the Supreme Court unanimously agreed that the debts incurred by the corporation were not debts of the state if no property of the state was mortgaged as security, but that if any property of the state was mortgaged, a debt of the state was created.<sup>30</sup> The Justices stated that in their opinion there was no difference in substance between the obligation of the state to pay its direct debts and its duty to redeem its property pledged as security for money expended for its benefit.

There is a second possible limitation on the principle that a debt incurred by a public corporation is a debt of the corporation only. If the corporation is a state agency with powers coextensive with the state itself and in point of fact is really a department or arm of state government, supported entirely or almost entirely by legislative appropriations, a debt incurred by it may constitute a debt of the state notwithstanding its corporate status.<sup>31</sup>

---

29. R. I. P. L. June Sess. 1933, c. 2078, §§ 3, 7; R. I. CONST. art. IV, § 13.

30. *In re* Opinion to the Governor, 169 Atl. 748 (R. I. 1933).

31. *Wilson, Att'y Gen. v. State Water Supply Commission*, 84 N. J. Eq. 150, 93 Atl.

In view of these limitations, the Act creating the Port of New York Authority and other similar acts creating authorities in states with constitutional limitations respecting state debts similar to those in New York and New Jersey, must be sustained upon the theory that the debts of such authorities are the debts of separate and subordinate instrumentalities akin to the debts of municipal corporations.

It is, of course, well established that a constitutional limitation on the power of the state to incur a debt has no application to local or municipal indebtedness.<sup>32</sup> The legislature may be able to grant a power and at the same time be unable directly to exercise a similar power. A contrary view would overthrow the legality of municipal bonds in a state prohibiting the legislature from incurring a debt. The reasoning of the courts in cases treating of obligations of a municipal corporation proper should apply with equal force to obligations of an authority when the authority is an independent legal entity, with power to undertake a revenue-producing enterprise and to raise revenues by fees, tolls or other charges, but has no power to encumber the property of the state as security for such obligations, and when the statute provides that such obligations shall be that of the authority alone.

In the state of New York during the years 1933 and 1934 a number of statutes were enacted creating authorities, based upon the principles of the Port of New York Authority legislation, but more restricted in scope of purposes. The Legislature declared these authorities to be public benefit corporations.<sup>33</sup> Their governing bodies were usually appointed by the Governor, although in one or two instances they were appointed by the legislature. Each authority was given power to construct a designated project such as a bridge,<sup>34</sup> health resort,<sup>35</sup> an astro-

---

732 (1915); *McClain v. Regents of the University*, 124 Ore. 629, 265 Pac. 412 (1928). But *cf.* *Christman v. Wilson*, 187 Ky. 644, 221 S. W. 198 (1920).

32. See *e.g.*, *People v. Flagg*, 46 N. Y. 400, 406 (1871).

33. GENERAL CORPORATION LAW, Laws of New York, 1929, c. 650, art. 1, § 3 (2): "A 'public benefit corporation' is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which enure to the benefit of this or other states, or to the people thereof."

34. Tri-Borough Bridge Authority, Laws of New York, 1933, c. 145; New York State Bridge Authority, Laws of New York, 1932, c. 548 as amended by Laws, 1933, c. 67; Lake Champlain Bridge Commission, Laws of New York, 1933, c. 201; Niagara Frontier Bridge Commission, Laws of New York, 1929, c. 594 as amended by Laws, 1930, c. 827, Laws, 1931, c. 380, Laws, 1933, c. 89 and Laws, 1934, c. 300; Thousand Island Bridge Authority, Laws of New York, 1933, c. 209; Buffalo and Fort Erie Public Bridge Authority, Laws of New York, 1933, c. 824.

35. Saratoga Springs Authority, Laws of New York, 1933, c. 208.

nomical planetarium,<sup>36</sup> a motor parkway,<sup>37</sup> a produce market,<sup>38</sup> and industrial exhibit,<sup>39</sup> or a public park and public recreation center.<sup>40</sup> In addition, power was conferred to issue bonds not in excess of a stated amount, levy and collect charges for the use of the facility, prescribe the remedies of the bondholders in the event of default, restrict the construction of competing facilities, limit the issuance of additional bonds and enter into such agreements with the holders of the bonds as might be deemed advisable to secure the payment of the obligations. A commendable feature of this method of construction of public improvements is that, when all the bonds of the authority are finally discharged, the title to the property passes to the state or the city of New York and the life of the authority terminates. The creation of New York authorities<sup>41</sup> has perhaps made it unnecessary for the legislature to pass a revenue bond law, common in many other states, authorizing the issuance of bonds by the state or by its municipalities payable solely out of the income of the enterprise for the financing of which the bonds were issued.<sup>42</sup>

A further development of the authority as a governmental instrumentality has been seen recently in the commonwealth of Pennsylvania. The Supreme Court of that state in 1912 decided that bonds payable solely out of revenues of a waterworks system constituted an indebtedness within the meaning of the state constitution. The court stated:

---

36. American Museum of Natural History Planetarium Authority, Laws of New York, 1933, c. 214 as amended by Laws, 1933, c. 817.

37. Jones Beach State Parkway Authority, Laws of New York, c. 70; Pelham Portchester Parkway Authority, Laws of New York, 1933, c. 68; Henry Hudson Parkway Authority, Laws of New York, 1934, c. 138; Marine Parkway Authority, Laws of New York, 1934, c. 162.

38. Central New York Regional Market Authority, Laws of New York, 1933, c. 232; Lower Hudson Regional Market Authority, Laws of New York, 1933, c. 231.

39. Industrial Exhibit Authority, Laws of New York, 1933, c. 246 as amended by Laws, 1934, c. 304.

40. Bethpage Park Authority, Laws of New York, 1933, c. 801.

41. The development of authorities has perhaps been more marked in New York than elsewhere. Typical instances of authorities created by other states: The Alabama State Bridge Corporation (Ala. Acts 1927, p. 278), discussed in *Alabama State Bridge Corp. v. Smith*, 217 Ala. 311, 116 So. 695 (1928); California Toll Bridge Authority (Cal. St. 1929, c. 763), discussed in *In re California Toll Bridge Authority*, 212 Cal. 298, 298 Pac. 485 (1931) and in *California Toll Bridge Authority v. Kelly*, 218 Cal. 7, 21 P. (2d) 425 (1933); Hackensack River Sewerage Authority (N. J. Pamph. Laws 1933, c. 373); Allegheny County Authority (Pa. P. L. Spec. Sess. 1933-34, 114) discussed in *Tranter v. Allegheny County Authority*, 173 Atl. 289 (Pa. 1934); and by the Federal Government: St. Lawrence Bridge Commission, P. L. No. 52, 73d Cong., 1st Sess. (1933).

42. An amendment last year to the General City Law prohibits the issuance of obligations by a city unless it has pledged its faith and credit for payment of the principal and interest thereof. Laws of New York, 1933, c. 390.

"To permit a borough or city to borrow money under a contract that it shall not be liable for its repayment, but that the lender must look solely to pledged municipal property or assets, would, in effect, annul the constitutional restriction on municipal improvidence and strike down a safeguard against municipal profligacy."<sup>43</sup>

In June of 1934, the same court had before it for consideration an act under which the Allegheny County Authority had been created for the purpose of constructing, maintaining and operating bridges, tunnels, streets and highways in Allegheny County.<sup>44</sup> The Authority was empowered, among other things, to charge and collect fees, tolls and rentals, to borrow money and issue bonds and secure the payment of the bonds by a pledge of revenues. An allotment in the amount of thirty million dollars was made to the Authority by PWA. A taxpayer's suit was brought to enjoin the Authority from executing a loan and grant agreement with the federal government. It was argued before the court that the creation of the Authority was a fictitious design to evade the constitutional limitation on the indebtedness of counties and that the bonds of the Authority were, in effect, obligations of Allegheny County. The court, although approving its original holding, decided that the obligations of the Authority were not the debts of the county, because the county had neither agreed to pay them nor could it be required to do so. The court said: "It is never an illegal evasion to accomplish a desired result, lawful in itself, by discovering a legal way to do it."<sup>45</sup>

It is important to note that although the Act providing for the creation of the Authority authorized it to secure any of its obligations by mortgage on any of its property, the indenture of trust which was before the court provided only for a pledge of the income of the Authority derived from the revenue producing improvements to be undertaken. The court emphasized that the highways, bridges and tunnels which constituted the project could not be foreclosed and sold in satisfaction of the debt of the Authority but could only be controlled for such limited time and extent as might be necessary to pay the debt out of the revenues received in accordance with the terms of the indenture.

The attitude of the Pennsylvania court will probably be adopted by other courts which may have occasion to pass upon similar questions. The way will thus be opened to a more widespread use of the Authority as an instrumentality for undertaking revenue producing enterprises. The future will no doubt witness the extension of the use of the Authority as a self-sustaining public corporation to carry on various governmental

---

43. *Lesser v. Warren Borough*, 237 Pa. 501, 85 Atl. 839 (1912).

44. Act of Dec. 22, 1933, Pa. Spec. Sess. 1933-34, P. L. 114.

45. *Tranter v. Allegheny County Authority*, 173 Atl. 289 (Pa. 1934).

activities, mainly for the reason that through such instrumentalities public improvements can be effectuated without imposing additional burdens of debt amortization or sinking fund payments upon taxpayers and without adding to the indebtedness of the state or any of its municipalities.<sup>46</sup> The Public Works Administration has suggested in appropriate cases the passage of legislation creating this type of public corporation as a means for the construction of sound revenue producing projects.

### *Constitutional Limitations on State Indebtedness*

Another application of the principle that obligations issued by an incorporated instrumentality of a state are not debts of the state may be found in the line of cases holding that bonds issued by state institutions do not constitute indebtedness of the state. This principle has been applied to permit the issuance of bonds by state universities in Idaho,<sup>47</sup> Louisiana,<sup>48</sup> Minnesota,<sup>49</sup> New Mexico,<sup>50</sup> and Wyoming,<sup>51</sup> by state boards of education in Georgia,<sup>52</sup> Montana,<sup>53</sup> and Virginia,<sup>54</sup> by agricultural colleges in North Dakota and Oklahoma<sup>55</sup> and by a state normal school and a state tuberculosis sanatorium in Montana.<sup>56</sup> These

---

46. Two additional reasons for the use of the Authority in the field of port development have been pointed out: (1) It relieves the state or municipality of legal liability, arising either *ex contractu* or *ex delicto*, in connection with the operation of the enterprise and places the burden where it belongs, upon the operation itself; (2) It affords a convenient method of merging existing public bodies, theretofore exercising various port functions, without sacrificing continuity of policy or personnel. See *What Authority has an Authority?* address by Cohen, J. H., delivered before the American Association of Port Authorities, Toronto, Canada, Sept. 5, 1933.

47. IDAHO CONST. art IV, § 18; State *ex rel.* Black v. State Board of Ed., 33 Idaho 415, 196 Pac. 201 (1921).

48. La. Act. No. 145, 1876; Caldwell Bros. v. Board of Supervisors, 176 La. 825, 147 So. 5 (1933).

49. Minn. Laws 1927, c. 442; Fanning v. University of Minnesota, 183 Minn. 222, 236 N. W. 217 (1931).

50. N. M. Laws 1927, c. 47; State v. Regents, 32 N. M. 428, 258 Pac. 571 (1927). See N. M. Laws Spec. Sess. 1934, c. 19.

51. Wyo. Laws Spec. Sess. 1933, c. 21; Arnold v. Bond, 34 P. (2d) 28 (Wyo. 1934).

52. Ga. Laws 1931, p. 20; State v. Regents, 175 S. E. 567 (Ga. 1934).

53. Mont. Laws Extra Sess. 1933, c. 10; State *ex rel.* Veeder v. State Board of Ed., 33 P. (2d) 516 (Mont. 1934); Mont. Laws 1927, c. 94; Barbour v. State Board of Ed., 92 Mont. 321, 13 P. (2d) 225 (1932).

54. Va. Acts Extra Sess. 1933, c. 49; Philips v. University of Virginia, 97 Va. 472, 34 S. E. 66 (1889).

55. N. D. Laws 1929, c. 102; State *ex rel.* Kaufman v. Davis, 59 N. D. 191, 229 N. W. 105 (1930); Okla. Laws 1931, c. 34, art. 6; Baker v. Carter, 25 P. (2d) 747 (Okla. 1933).

56. Mont. Laws Extra Sess. 1933, c. 7; State *ex rel.* Blume v. State Board of Ed., 34 P. (2d) 515 (Mont. 1934); Mont. Laws Extra Sess. 1933, c. 22; State *ex rel.* Hawkins v. State Board of Examiners, 35 P. (2d) 116 (Mont. 1934).

cases rest partly on the ground that the bonds issued by a state institution are debts only of the institution, and not of the state, and partly on the ground that the bonds are payable out of a special fund raised from sources other than taxation. A recent case in Georgia rests its decision solely on the first ground<sup>57</sup> and a decision in Oregon is based solely on the second ground,<sup>58</sup> although most of the decisions are based on both grounds indiscriminately.<sup>59</sup> The limitations mentioned above in connection with Authorities, namely that the Authority may not mortgage property of the state and that the Authority, though a body corporate, may be so completely an administrative arm of the state as to be in effect a department of state government, perhaps may also be applied by some courts to obligations of state institutions.<sup>60</sup>

There are a few cases involving the application of constitutional prohibitions against the incurring of debts by States themselves which have come before the courts as a result of attempts on the part of States to secure loans from PWA, which may be of some interest in showing the progress of the law. The State of Kansas applied for a loan of twenty-two million dollars under an act which authorized the State Highway Commission to issue warrants payable out of a fund derived from special taxes on motor vehicles and fuel.<sup>61</sup> The Highway Commission was a separate body corporate organized to carry forward, on behalf of the State, the work of constructing and maintaining a system of highways. The Supreme Court of Kansas held that although the warrants were warrants of the State of Kansas, nevertheless they did not constitute debts of the State within the meaning of the constitutional prohibition against the incurring of State debts because the farmers of that prohibition were guarding against debts payable by a general prop-

---

57. *State v. Regents*, 175 S. E. 567 (Ga. 1934).

58. *Ore. Laws* 1927, p. 364; *McLain v. Regents*, 124 Ore. 629, 265 Pac. 412 (1928).

59. Some of the decisions, based on the ground that the bonds are payable out of a special fund, involve bonds payable, not out of revenues derived from the undertaking financed thereby, but bonds payable out of the income of lands granted by the Federal Government for university purposes, or the permanent school fund resulting from the sale of such lands. *State ex rel. Black v. State Board of Ed.*, 33 Idaho 415, 196 Pac. 201 (1921); *State v. Regents*, 32 N. M. 428, 258 Pac. 571 (1927); *Arnold v. Bond*, 34 P. (2d) 28 (Wyo. 1934); *State ex rel. Blume v. State Board of Ed.*, 34 P. (2d) 515 (Mont. 1934). *Contra*: *State ex rel. Haire v. Rice*, 33 Mont. 365, 83 Pac. 874 (1906), *aff'd*, 204 U. S. 291 (1907); *State v. Candland*, 36 Utah 406, 104 Pac. 285, 24 L. R. A. (n. s.) 1260 (1909); *Roach v. Gooding*, 11 Idaho 244, 81 Pac. 642 (1905). On the nature of the obligation imposed by the Federal Government, see *Alabama v. Schmidt*, 232 U. S. 168 (1914), *per Holmes, J.*

60. *Wilder v. Murphy*, 56 N. D. 436, 218 N. W. 156 (1928) (mortgage of state property); *McLain v. Regents*, 124 Ore. 629, 265 Pac. 412 (1928) (department of state government).

61. *Kan. Laws Spec. Sess.* 1933, c. 98; *Kan. Laws Spec. Sess.* 1934, c. 4.

erty tax and not against obligations payable out of a special tax, such as a tax on motor vehicles and fuels.<sup>62</sup> Possibly the decision might also be justified on the narrower ground that bonds payable out of a tax levied only upon a class specially benefited by the use to which the proceeds of the bonds are devoted are not debts of the State within the constitutional limitation because their issuance cannot increase the tax burdens of the State generally.

Some courts have recognized that there has been an emergency so serious as to justify the relaxation of the debt limitations permitted by their Constitutions only in the event of grave peril. Last year the Supreme Court of Washington held that conditions in that State were so alarming, that an act of the Legislature authorizing the issuance of bonds to suppress an insurrection was a valid enactment under a provision of the State Constitution permitting the Legislature to authorize bonds for such a purpose.<sup>63</sup> The court stated that it was not necessary to wait until insurrection was actually present, but it would be sufficient if insurrection were even incipient, and indicated that it was better to allay revolt by bonds than by bullets.<sup>64</sup>

On the other hand the Justices of the Supreme Court of Colorado, though recognizing the existence of a grave emergency, in an advisory opinion, declared that action "to defend the State" will not be warranted until the State is threatened or attacked and that such threat or attack must be by force of arms.<sup>65</sup> It was their opinion, therefore, that an Act authorizing the issuance of ten million dollars of bonds to PWA, the proceeds of which were to be used in giving employment in the construction of highways, would be unconstitutional.

A case in Wyoming illustrates neatly the discomfort which must be the lot of many judges who feel compelled by the law and the dictates of duty to decide a case one way, when their training and habits of thought sway them in the opposite direction. The Supreme Court of Wyoming had before it an act authorizing the University of Wyoming to issue bonds secured by the income of the University permanent land

---

62. State of Kansas *ex rel.* Boynton v. State Highway Commission, 28 P. (2d) 770, 32 P. (2d) 493 (Kan. 1934). But *cf.* *In re* Senate Res. No. 2, *etc.*, 31 P. (2d) 325 (Colo. 1933).

63. State *ex rel.* Hamilton v. Martin, 23 P. (2d) 1 (Wash. 1933); *Muskegon Heights v. Danigelis*, 253 Mich. 260, 235 N. W. 83, 73 A. L. R. 696 (1931).

64. "Prevention is always better than cure, whether in the body politic or in the human body. Disorders which constitute 'incipient insurrection' were declared by the Legislature and approved by the Governor as existing in this State at the time the combined legislation was enacted. It would seem to any rational mind that it is far better to cure insurrection or incipient insurrection by promoting prosperity rather than by the use of bullets." *Per* Holcomb, J., in State *ex rel.* Hamilton v. Martin, 23 P. (2d) 1 (Wash. 1933).

65. *In re* Senate Res. No. 2, *etc.*, 31 P. (2d) 325 (Colo. 1933).

fund for the construction of a liberal arts building. The Court resolved the different legal questions presented in favor of the validity of the bonds and then commented as follows:

"Courts will not hold a law invalid, if it can be upheld on any reasonable ground, and we think we should uphold it in this case, leaving the blame for any folly, if folly there is, to rest where it should,—with the Legislature and the board of trustees of the University. . . . And . . . we should bear in mind that our individual feeling of apprehension of future danger, if any, might lead us to err. Speaking individually and generally, and not for the Court, it is not, perhaps, surprising that such apprehension should exist and in no small degree. The favorable aspects presented in the case at bar would have a tendency to allay it in this particular instance, were it not for the fact that here a new field, heretofore considered sacred, is invaded for the purpose of exploration. Is there no end? Many of us were not brought up in the bosom of luxury, nor did we sleep in marble halls. The village schools with their humble surroundings, and the University campus, graced with edifices hoary with age, seem to us to satisfy the longings for learning. We heard at that time of the wrecks and ruins of the past brought about by mortgaging the future, ordinarily generously indulged in under pretense of benefit to the children yet unborn, but often in reality with the purpose that the living may enjoy the magnificence of the present at the expense of posterity—the forgotten man. We heard of the existence in the past of cities, once humming with the glad refrain of hundreds of thousands of happy human beings, lying now desolate, with their stately baths, their roomy porticoes, their sacred shrines in ruins because no space, no corner, no nook had become exempt from the invasion of the gatherer of public burdens. Do ruins tell tales merely to be scorned? But perhaps we heard wrongly. Times change. Younger generations perhaps learn better than their elders. The tide of the day sweeps us along into whirlpools which seem giddy. We can but hope that they may not be what they seem. The judgment of the trial court is affirmed."<sup>66</sup>

### *Revenue Bonds*

Another significant development of the law of municipal corporations is found in the extensive use by municipalities of revenue as distinguished from tax obligations. The use of revenue bonds is usually predicated upon express statutory enactments. Revenue bond laws authorize the issuance of negotiable obligations payable solely from the gross or net revenues of the utility constructed or improved with the proceeds from their sale. Usually, they contain, for whatever it may be worth as a declaration of the intention of the Legislature, a provision that such obligations shall not constitute an indebtedness within the meaning of any statutory or constitutional restriction or limitation.

Power vested in the Reconstruction Finance Corporation in 1932 to

---

66. See *Arnold v. Bond*, 34 P. (2d) 28, 35 (Wyo. 1934).



make loans for self-liquidating municipal enterprises<sup>67</sup> acted as a stimulus for the adoption of such laws. The fact that PWA accepted revenue bonds as security for loans to finance sound enterprises materially increased the number of statutes of this type.

More than half the States have enacted such legislation for the financing of waterworks or sewer systems.<sup>68</sup> As we have seen, several States have adopted revenue bond acts authorizing the construction of dormitories or other campus buildings by State educational institutions.<sup>69</sup> Some have passed revenue bond acts for the construction of toll-bridges.<sup>70</sup> Several have enacted laws of broader scope permitting the issuance of such obligations for almost every conceivable type of revenue producing enterprise.<sup>71</sup>

The decisions rendered by the courts in passing upon the validity of

---

67. 47 STAT. 709, 711; P. L. No. 302, 72d Cong., 1st Sess. (1933) § 201 (a) (1).

68. *Alabama*: Acts of 1932, No. 264 and No. 265; Acts of 1933, No. 46, No. 47 and No. 102; *Arkansas*: Laws of 1933, Act 131 and Act 132; *California*: Statutes 1933, c. 331; *Connecticut*: Cum. Supp. 1933, c. 33a and c. 33b; *Idaho*: Laws 1933, c. 186; *Illinois*: SMITH-HURD REV. STAT. 1933, c. 24, §§ 440-446, as amended by Ill. Laws 3d Spec. Sess. 1933-34, p. 141; SMITH-HURD REV. STAT. 1933, c. 24, § 490 h-r, as amended by Ill. Laws 3d Spec. Sess. 1933-34, p. 128; *Indiana*: Laws of 1929, c. 155, as amended by Laws 1931, c. 14 and Laws 1933, c. 254; Laws 1933, c. 190 and c. 235; Laws 1932, c. 61 as amended by Laws 1933, c. 187; *Iowa*: Code 1931, § 6134-dl as amended by Laws Extra Sess. 1933-34, c. 74; G. A. 1933, c. 111 as amended by Laws Extra Sess. 1933-34, c. 71; *Kansas*: KAN. REV. STAT. ANN. (Supp. 1933), §§ 12-805 A; *Kentucky*: KY. STAT. (Carroll, Supp. 1933), § 2741-L-23 and § 2741-L-44; *Michigan*: Pub. Acts 1933, Act 94; Pub. Acts 1931, Act 316; *Mississippi*: Laws 1934, c. 316 and c. 317; *Nebraska*: Laws 1933, c. 146; *New Mexico*: Laws 1933, c. 57 as amended by Laws 1934, c. 4; *North Dakota*: Laws 1933, c. 179; *Ohio*: Gen. Code 1932, § 2293-29, §§ 3891-1 to 3891-5; *Oregon*: Laws 1933, c. 289; *South Carolina*: Acts 1933, Act 299 as amended by Acts 1934, Act. 798; *South Dakota*: Laws 1931, c. 194; *Tennessee*: Laws 1933, c. 68; *Texas*: R. C. S. 1925, art. 1111-1118 as amended by Acts 1927, c. 194, by Acts 1931, c. 314, and by Acts 3d Sess. 1932, c. 32; *Utah*: Laws 2d Spec. Sess. 1933, c. 22; *Virginia*: Acts 1933, c. 163; Acts Spec. Sess. 1933, c. 26; *Washington*: Pierce's 1933 Code, § 1217; *West Virginia*: Acts 1st Extra Sess. 1933, c. 25, as amended by Acts 2d Extra Sess. 1933, c. 48; Acts 1st Extra Sess. 1933, c. 26, as amended by Acts 2d Extra Sess. 1933, c. 49.

69. *Arkansas*: Laws 1933, Act 47; *Montana*: Laws 1929, c. 94; Laws Extra Sess. 1933, c. 7 and c. 10; *New Mexico*: Laws 1927, c. 49; *North Dakota*: Laws 1929, c. 102; *Oklahoma*: Laws 1931, c. 34; *Oregon*: Laws 1927, c. 289; *Virginia*: Laws Extra Sess. 1933, c. 49; *West Virginia*: Acts 1933, c. 9 as amended by Acts 2d Extra Sess. 1933, c. 38; *Washington*: Laws Extra Sess. 1933, c. 23 and c. 24; *Wyoming*: Laws Spec. Sess. 1933, c. 21.

70. *Alabama*: Acts 1931, Act 118; *Florida*: Spec. Acts 1933, c. 16344, No. 487; *Kentucky*: KY. STAT. (Carroll, 1930), § 4356-4-5; *Missouri*: Laws Extra Sess. 1933-34, p. 115; *South Carolina*: Acts 1933, Act 299 as amended by Acts 1934, Act 798; *West Virginia*: Acts 2d Extra Sess. 1933, c. 27.

71. For example: *Michigan*: Laws 1933, Act 94; *Mississippi*: Laws 1934, c. 316 and c. 317; *South Carolina*: Acts 1933, Act 299 as amended by Acts 1934, Act 798; *Utah*: Laws 2d Spec. Sess. 1933, c. 22.

revenue bond legislation have given rise to the so-called "Special Fund Doctrine." The questions usually presented in these cases are whether revenue bonds constitute an indebtedness within the meaning of a constitutional limitation on the amount of indebtedness which may be incurred or whether constitutional provisions requiring a bond issue to be approved at an election, or making mandatory the levy of a tax to pay interest and principal on bonds, apply.<sup>72</sup> The Special Fund Doctrine affirms that obligations payable solely from a special fund derived from the revenues of the enterprise for which such obligations are issued do not constitute a bond or a debt within the meaning of any such constitutional limitation or provision.<sup>73</sup>

72. Constitutional provisions limiting indebtedness: ALA. CONST. §§ 225, 226; ARIZ. CONST. art. IX, § 8; ARK. CONST. amend. No. 11; CAL. CONST. art. XI, § 18; COLO. CONST. art. XI, § 8; FLA. CONST. art. XII, § 17; GA. CONST. art. VII, § 7; ILL. CONST. art. IX, § 12; IND. CONST. art. XIII, § 1; IOWA CONST. art. XI, § 3; KY. CONST. §§ 157-158; LOUISIANA CONST. art. XIV, § 24; MAINE CONST. arts. XXII, XXXIV; MICH. CONST. art. VIII, § 24; MO. CONST. art. X, § 12; MONT. CONST. art. XIII, § 6; N. M. CONST. art. IX, § 13; N. Y. CONST. art. VIII, § 10; N. C. CONST. art. VII, § 7; N. D. CONST. art. XXXV, § 183; OKLA. CONST. art. X, § 26; PA. CONST. art. IX, §§ 8, 15; S. C. CONST. art. VIII, § 7; S. D. CONST. art. XIII, § 4; TEX. CONST. art. XI, §§ 5, 7; UTAH CONST. art. XIV, §§ 3, 4; VA. CONST. art. CXXVII; WASH. CONST. art. VIII, § 6; W. VA. CONST. art. X, § 8; WIS. CONST. art. XI, § 3; WYO. CONST. art. XVI, §§ 4, 5.

Constitutional provisions requiring approval at elections: ALA. CONST. § 222; ARIZ. CONST. art. IX, § 8; CAL. CONST. art. XI, § 18; COLO. CONST. art. XI, §§ 6, 7, 8; FLA. CONST. art. IX, § 6; GA. CONST. art. VII, § 7; IDAHO CONST. art. VIII, § 3; KY. CONST. §§ 157, 157a, 158; LA. CONST. art. XII, § 10 and art. XIV, § 14a; MICH. CONST. art. IV, § 49 and art. VIII, § 10; MO. CONST. art. X, §§ 12, 12a; MONT. CONST. art. XIII, §§ 5, 6; N. M. CONST. art. IX, §§ 8, 10, 11, 12; N. C. CONST. art. VII, § 7; N. D. CONST. art. XII, §§ 183, 187; OKLA. CONST. art. X, §§ 26, 27; ORE. CONST. art. XI, §§ 9, 10, 11; PA. CONST. art. IX, §§ 8, 15; S. C. CONST. art. VIII, §§ 5, 7; S. D. CONST. art. XIII, § 4; UTAH CONST. art. XIV, § 3; VA. CONST. art. VII, § 115 (a) and art. VIII, § 127; WASH. CONST. art. VIII, § 6; W. VA. CONST. art. X, § 8; WYO. CONST. art. XVI, §§ 2, 4.

Constitutional provisions making mandatory levy of tax; ARK. CONST. art. XVI, § 1; COLO. CONST. art. XI, § 8; FLA. CONST. art. XII, § 17; GA. CONST. art. VIII, § 10; IDAHO CONST. art. VIII, § 3; ILL. CONST. art. IX, § 12; KY. CONST. § 159; LA. CONST. art. XIV, § 14a; MONT. CONST. art. XIII, § 2; N. M. CONST. art. IX, § 12; OKLA. CONST. art. X, §§ 26, 28; PA. CONST. art. X, § 10; S. D. CONST. art. XIII, § 5; TEX. CONST. art. VII, § 5 and art. XI, § 3a; W. VA. CONST. art. X, § 8; WIS. CONST. art. XI, § 3.

73. *Alabama*: Alabama State Bridge Corp. v. Smith, 217 Ala. 311, 116 So. 695 (1928); *In re* Opinions of Justices, 226 Ala. 18, 145 So. 481 (1933); *In re* Opinions of Justices, 226 Ala. 570, 148 So. 111 (1933); *In re* Opinions of Justices, 152 So. 901 (Ala. 1934); Smith v. Town of Guin, 155 So. 865 (Ala. 1934); Oppenheim v. City of Florence, 155 So. 859 (Ala. 1934); *Arkansas*: Mississippi Valley Power Co. v. Board of Improvements, etc., 145 Ark. 76, 46 S. W. (2d) 32, 35 (1932); Jernigan v. Harris, 62 S. W. (2d) 5 (Ark. 1933); see McCutcheon v. City of Siloam Springs, 185 Ark. 76, 49 S. W. (2d) 1037, 1038 (1932); *California*: California Toll Bridge Authority v. Wentworth, 212 Cal. 298, 298 Pac. 485 (1931); Shelton v. Los Angeles, 206 Cal. 544, 275 Pac. 421 (1929); California Toll Bridge Authority v. Kelly, 21 P. (2d) 425 (Cal. 1933); Garrett v. Swanton, 216

Only in a few States has the Special Fund Doctrine been disapproved,

Cal. 220, 13 P. (2d) 725 (1932); *Department of Water & Power v. Vroman*, 22 P. (2d) 698 (Cal. 1933); *Colorado*: *Shields v. City of Loveland*, 74 Colo. 27, 218 Pac. 913 (1923); *Searle v. Town of Haxtun*, 84 Colo. 494, 271 Pac. 629, 630 (1928); *Franklin Trust Co. v. City of Loveland*, 3 F. (2d) 114 (1924); *Reimer v. Town of Holyoke*, 27 P. (2d) 1032 (Colo. 1933); *Florida*: *State and Jos. Diver v. City of Miami*, 152 So. 6 (Fla. 1934); *Illinois*: *Schnell v. City of Rock Island*, 232 Ill. 89, 83 N. E. 462 (1908); *Maffit v. City of Decatur*, 332 Ill. 82, 152 N. E. 602 (1926); *Ward v. City of Chicago*, 342 Ill. 167, 173 N. E. 610 (1930); *City of Jerseyville v. Connett*, 49 F. (2d) 246 (C. C. A. 7th, 1931); *cf. Joliet v. Alexander*, 194 Ill. 457, 62 N. E. 861 (1902); *Indiana*: *Fox v. Bicknell*, 193 Ind. 537, 141 N. E. 222 (1932); *Underwood v. Fairbanks-Morse & Co.*, 185 N. E. 118 (Ind. 1933); *Indiana Service Corp. v. Town of Warren*, 189 N. E. 523 (Ind. 1934); *Iowa*: *Johnston v. City of Stuart*, 226 N. W. 164 (Iowa 1929); *Wyatt v. Town of Manning*, 250 N. W. 141 (Iowa 1933); *Kansas*: *State ex rel. Boynton v. Highway Commission*, 28 P. (2d) 770 (Kan. 1934); *State ex rel. Boynton v. Highway Commission*, 32 P. (2d) 493 (Kan. 1934); *Kentucky*: *City of Bowling Green v. Kirby*, 220 Ky. 839, 295 S. W. 1004 (1927); *Klein v. City of Louisville*, 224 Ky. 624, 6 S. W. (2d) 1104 (1928); *Estes v. Highway Commission*, 235 Ky. 86, 29 S. W. (2d) 583 (1930); *Bloxton v. Highway Commission*, 225 Ky. 324, 8 S. W. (2d) 392 (1928); *Jones v. Corbin*, 227 Ky. 674, 13 S. W. (2d) 1013 (1933); *Kentucky Utilities Co. v. City of Paris*, 248 Ky. 252, 58 S. W. (2d) 361 (1933); *Williams v. City of Raceland*, 245 Ky. 212, 53 S. W. (2d) 370 (1932); *Juett v. Williamstown*, 248 Ky. 235, 58 S. W. (2d) 411 (1933); *Wheeler v. Board of Com'rs*, 53 S. W. (2d) 740 (Ky. 1932); *Michigan*: *Block v. City of Charlevoix*, 255 N. W. 579 (Mich. 1934); *Young v. City of Ann Arbor*, 255 N. W. 579 (Mich. 1934); *Gilbert v. Traverse City*, 255 N. W. 585 (Mich. 1934); *Minnesota*: *Fanning v. University of Minn.*, 183 Minn. 222, 236 N. W. 47 (1931); *Williams v. Village of Kenyon*, 187 Minn. 161, 244 N. W. 558 (1932); *Missouri*: *State v. City of Neosho*, 203 Mo. 40, 101 S. W. 99 (1907); *Bell v. City of Fayette*, 325 Mo. 75, 28 S. W. (2d) 356 (1930); *Hight v. Harrisonville*, 328 Mo. 549, 41 S. W. (2d) 155 (1931); *Hagler v. City of Salem*, 62 S. W. (2d) 751 (Mo. 1933); *State ex rel. City of Hannibal v. Smith*, 74 S. W. (2d) 367 (Mo. 1934); *Montana*: *Barbour v. State Board of Ed.*, 92 Mont. 321, 13 P. (2d) 225 (1932); *Veeder v. State Board of Ed.*, 33 P. (2d) 516 (Mont. 1934); *Blume v. State Board of Ed.*, 34 P. (2d) 515 (Mont. 1934); *Hawkins v. State Board of Examiners*, 35 P. (2d) 116 (Mont. 1934); *Nebraska*: *Carr v. Fenstermacher*, 119 Neb. 172, 228 N. W. 114 (1929); *Interstate Power Co. v. City of Ainsworth*, 250 N. W. 649 (Neb. 1933); *Kirby v. Omaha Bridge Comm'n*, 255 N. W. 776 (Neb. 1934); *New Mexico*: *State v. University of N. M.*, 32 N. M. 428, 258 Pac. 57 (1927); *Seward v. Bowers*, 37 N. M. 385, 24 P. (2d) 253 (1933); *North Carolina*: *Brockenbrough v. Board of City Comm'rs*, 134 N. C. 1, 46 S. E. 28 (1903); *North Dakota*: *Lang v. Cavalier*, 59 N. D. 75, 228 N. W. 819 (1930); *State v. Davis*, 59 N. D. 191, 229 N. W. 105 (1930); *Ohio*: *Kasch v. Miller*, 105 Ohio St. 281, 135 N. E. 813 (1922); *Pathe v. Donaldson*, 29 Ohio App. 171, 163 N. E. 204 (1928); *Oregon*: *McLain v. Regents*, 124 Ore. 629, 265 Pac. 412 (1929); *see Butler v. Ashland*, 113 Ore. 134, 232 Pac. 655, 657 (1925); *South Carolina*: *Briggs v. Greenville County*, 137 S. C. 288, 135 S. E. 153 (1926); *Cathcart v. City of Columbia*, 170 S. E. 435 (S. C. 1933); *Texas*: *Sewell v. Griffith*, 294 S. E. 521 (Tex. 1927); *Womack v. City of West University Place*, 32 S. W. (2d) 930 (Tex. 1930); *City of Dayton v. Allred*, 68 S. W. (2d) 172 (Tex. 1934); *City of Richmond v. Allred*, 71 S. W. (2d) 233 (Tex. 1934); *City of Houston v. Allred*, 71 S. W. (2d) 251 (Tex. 1934); *Utah*: *Barnes v. Lehi City*, 74 Utah 321, 279 Pac. 878 (1929); *Fjeldsted v. Ogden City*, 28 P. (2d) 144 (Utah 1934); *Wadsworth v. Santaquin*, 28 P. (2d) 161 (Utah 1934); *Washington*: *Winston v. City of Spokane*, 12

and in some of these the disapproval is not clear cut.<sup>74</sup> The Supreme Court of one of these States, Idaho, has recently indicated that if the matter were before it for the first time, it would follow the majority of the courts in upholding the Special Fund Doctrine,<sup>75</sup> and others seem to be wavering from their early positions.<sup>76</sup>

Some States have drawn a distinction between revenue bonds issued for the construction of a new utility, and revenue bonds issued to finance additions or extensions to existing utilities. The States of Utah,<sup>77</sup> Missouri,<sup>78</sup> Alabama,<sup>79</sup> South Dakota,<sup>80</sup> Oklahoma<sup>81</sup> and California,<sup>82</sup> have held that when revenue obligations are issued to finance the construction of improvements to a municipally-owned utility, and such obligations

Wash. 524, 41 Pac. 888 (1895); *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365 (1898); *Dean v. City of Walla Walla*, 48 Wash. 75, 92 Pac. 895 (1907); *Uhler v. City of Olympia*, 87 Wash. 1, 151 Pac. 117, 152 *id.* 998 (1915); *Schooley v. City of Chehalis*, 84 Wash. 667, 147 Pac. 410 (1915); *Twitchell v. City of Seattle*, 106 Wash. 32, 179 Pac. 127 (1919); *Griffin v. City of Tacoma*, 49 Wash. 424, 95 Pac. 1107 (1908); *State v. Clausen*, 134 Wash. 196, 235 Pac. 364 (1925); *James v. City of Seattle*, 300 Pac. 515 (Wash. 1931); *West Virginia*: *Bates v. State Bridge Commission*, 109 W. Va. 186, 153 S. E. 305 (1930); *Brewer v. City of Point Pleasant*, 172 S. E. 717 (W. Va. 1934); *Casto and Shinn v. Town of Ripley*, 173 S. E. Adv. Op. No. 6 (W. Va. 1934).

74. *Georgia*: *Byars v. City of Griffin*, 168 Ga. 41, 147 S. E. 66 (1929); *Morton v. City of Waycross*, 173 Ga. 298, 160 S. E. 330 (1931); *McCrary Co. v. Glennville*, 149 Ga. 431, 100 S. E. 362 (1919); *Idaho*: *Feil v. Coeur d'Alene*, 23 Idaho 32, 129 Pac. 643 (1912); *Miller v. City of Buhl*, 48 Idaho 668, 284 Pac. 843 (1930); *Williams v. City of Emmett*, 51 Idaho 500, 6 P. (2d) 475 (1931); *Straughan v. Coeur d'Alene*, 24 P. (2d) 321 (Idaho 1933); *Maryland*: *Mayor of Baltimore v. Gill*, 31 Md. 375 (1869); *New Jersey*: *Wilson v. State Water Supply Commission*, 84 N. J. Eq. 150, 93 Atl. 732 (1915); *New York*: *Rodman v. Munson*, 13 Barb. 63 (N. Y. 1852), *aff'd, id.* at 188; *Newell v. People*, 7 N. Y. 9 (1852). But *cf.* *Kelly v. Merry*, 262 N. Y. 151, 186 N. E. 425 (1933). *Oklahoma*: *Zachary v. City of Wagoner*, 146 Okla. 268, 292 Pac. 345 (1930); *City of Tecumseh v. Butler*, 148 Okla. 151, 298 Pac. 256 (1931). But *cf.* *Baker v. Carter*, 25 P. (2d) 747 (Okla. 1933). *Pennsylvania*: *Brown v. Corry*, 175 Pa. 528, 34 Atl. 854 (1896); *Lesser v. Warren Borough*, 237 Pa. 501, 85 Atl. 839 (1912); *Schuldice v. Pittsburg*, 251 Pa. 28, 95 Atl. 938 (1915); *Hoffman v. Kline*, 300 Pa. 485, 150 Atl. 889 (1930). But *cf.* *Tranter v. Allegheny County Authority*, 173 Atl. 289 (Pa. 1934).

75. *Straughan v. City of Coeur d'Alene*, 24 P. (2d) 321 (Idaho 1933).

76. *Tranter v. Allegheny County Authority*, 173 Atl. 289 (Pa. 1934); *Kelly v. Merry*, 262 N. Y. 151, 186 N. E. 425 (1933); *Baker v. Carter*, 25 P. (2d) 747 (Okla. 1933).

77. *Fjeldsted v. Ogden City*, 28 P. (2d) 144 (Utah 1933); *Wadsworth v. Santaquin*, 28 P. (2d) 161 (Utah 1933).

78. *Hight v. Harrisonville*, 328 Mo. 549, 41 S. W. (2d) 155 (1931); *cf.* *Bell v. City of Fayette*, 325 Mo. 75, 28 S. W. (2d) 356 (1930); *City of Campbell v. Arkansas-Missouri Power Co.*, 55 F. (2d) 560 (C. C. A. 8th, 1932).

79. *In re Opinion of the Justices*, 226 Ala. 570, 148 So. 111 (1933).

80. *Hesse v. Watertown*, 57 S. D. 325, 232 N. W. 53 (1930).

81. *Zachary v. City of Wagoner*, 146 Okla. 268, 292 Pac. 345 (1930).

82. *Garrett v. Swanton*, 216 Cal. 220, 13 P. (2d) 725 (1932).

are made payable from the revenues derived from the utility as improved, the constitutional provisions are applicable.

The theory of these courts is that to the extent that the general fund of the municipality is being deprived of revenues previously earned by the particular utility, the general fund must be replenished by monies raised by taxation, and, to this extent, the obligations are payable indirectly from taxation and therefore constitute an indebtedness of the issuing municipality.<sup>83</sup> In such States the only way in which a municipality can finance the construction of improvements without incurring an indebtedness, is by determining in advance what revenue will be derived from the improvements and then making the bonds payable only from such revenues. Thus far no workable system of allocation of revenues has been devised.<sup>84</sup> The Utah Legislature attempted to set up a method of allocation by providing that when a municipality desires to issue revenue bonds for improvements, its governing body shall declare the value of the existing plant and the value of the proposed improvements. When the contemplated improvements have been constructed, the revenues of the entire system are then divided in the same proportion as the declared values and only those revenues which are thus allocated to the improvements can be used for the payment of the bonds.<sup>85</sup>

This act was the subject of litigation in a case recently decided by the Supreme Court of Utah.<sup>86</sup> The majority of the court, though approving the general scheme set up in the statutes, took issue with the manner in which the city had applied the statutory provisions and enjoined the issuance of the bonds on the ground that an improper allocation of revenues had been made. The implication of this case is that the determination of the amount of revenue properly allocable to an addition to, or

---

83. "It follows necessarily, therefore, that the burden of the general taxpayer will be increased to make up to the general fund the amount which formerly went to the general fund, but now is to be impounded in the waterworks fund to meet the obligations of the water revenue bonds. Thus while tax revenues are not directly pledged to the payment of water revenue bonds, the tax levy must be increased and such revenues will be indirectly used to feed the special fund." *Per* Folland, J., in *Fjeldsted v. Ogden City*, 28 P. (2d) 144, 151 (Utah 1933).

84. "I do not concur in the conclusion reached nor the reasons given therefor in the Santaquin Case on the subject or method of segregation of revenues derived from the water-works system, and further, I do not see how the making of such segregation is practicable or within any degree of certainty, and in the Ogden Case it in effect was represented and conceded that it was impracticable if not impossible, if the improvements were made, and the plant operated with them, to determine what of the net revenues derived from the system were attributable to or occasioned by the improvements and what from other portion or portions of the system." *Per* Straup, C. J., dissenting in *Fjeldsted v. Ogden City*, 28 P. (2d) 144, 160 (Utah 1933).

85. Utah Laws 2d Spec. Sess. 1933, c. 22, § 14.

86. *Wadsworth v. Santaquin*, 28 P. (2d) 161 (Utah 1933).

extension of, a particular utility is a judicial question and court review is therefore necessary in many cases where such revenues are to be pledged.<sup>87</sup>

The experience of Ogden City Corporation bears witness to the unworkable features of this legislative attempt to circumvent the consequences of a restricted Special Fund theory. Since applying to the Reconstruction Finance Corporation in 1932 for a self-liquidating loan to finance needed improvements to its waterworks, Ogden City has been before the Supreme Court of Utah on three occasions and has each time failed to secure approval of its proposed bond issue.<sup>88</sup> The practical results of the Utah decisions are shown by the fact that PWA has not been able to make a single loan, secured by revenue bonds for improvements to municipally owned utilities, to any municipality in Utah, unless the municipality has complied with the constitutional requirement of holding an election.

The courts of Oklahoma,<sup>89</sup> California<sup>90</sup> and Missouri<sup>91</sup> seem to be gradually receding from their older decisions restricting the application of the Special Fund Doctrine. The reasoning of the courts which hold that a pledge of the revenues of an existing utility creates an indebtedness because it amounts to a drawing upon the general resources of the city which must be replenished by taxation, does not withstand analysis. In point of fact, the municipality is not taking money from its treasury, but is only anticipating and pledging future revenues of a particular utility. The rationale of the restricted theory is that it protects the taxpayer. On the other hand, a wise expenditure of the revenues of a utility for necessary improvements may do more to reduce taxes in the long run than would the transfer of such revenues to a municipality's general fund without regard to the physical needs of the system and the possible reduction in the earning power of the enterprise.

The attitude expressed by the Supreme Court of Florida in a case decided in 1934<sup>92</sup> represents a sound approach to the problem of revenue financing. The court recognized that the issue was not to define the meaning of the word "bonds" as used in the Constitution of the State of Florida, but rather to decide whether a city owning a water supply

---

87. See dissent *per* Straup, C. J., in *Fjeldsted v. Ogden City*, 28 P. (2d) 144, 160 (Utah 1934).

88. *Fjeldsted v. Ogden City*, 28 P. (2d) 144 (Utah 1933), *rehearing denied*, 28 P. (2d) 160 (Utah 1933); *Fjeldsted v. Ogden City*, 35 P. (2d) 825 (Utah 1934).

89. *Baker v. Carter*, 25 P. (2d) 747 (Okla. 1933).

90. *Department of Water and Power of Los Angeles v. Vroman*, 22 P. (2d) 698 (Cal. 1933).

91. *State ex rel. City of Hannibal v. Smith*, 74 S. W. (2d) 367 (Mo. 1934).

92. *State and Jos. Diver v. City of Miami*, 152 So. 6 (Fla. 1934).

system from which it derives unpledged net revenues, which it is admittedly empowered to expend for any useful purpose, may anticipate such revenues by borrowing money upon the security of a pledge of such revenues. The Court was of the opinion that a municipal corporation, engaged in the operation of a business enterprise in the nature of a public utility, should be given the same freedom of action and control of the revenues of enterprise as a privately owned public utility corporation would have in the conduct of its affairs. The constitutional limitations intended as safeguards against excessive borrowing by municipal corporations have no application if the obligations evidencing the borrowing are issued to finance the construction of a municipal utility, or to finance the improvement, repair or extension of such utility in order to make it more efficient or economical in operation, or in order to preserve or enlarge its usefulness to the community, and if the obligations simply anticipate the revenues of the utility, and the holders of the obligations may look for payment solely to such revenues and have no right to resort, either in the first instance, or in the event of deficiency, to the taxing power. This must eventually become the law, if municipalities are to supply the public with social services required by modern conditions and demanded by an aroused high-rate-paying public.

Recent legislation and court decisions show an unquestionable trend toward an enlargement of municipal enterprise in the ownership and administration of public and social services. With falling interest rates and improving municipal credit, the progressive extension of self-liquidating municipal services at a moderate cost may be expected, particularly in fields in which private enterprise cannot hope to compete. The broadened field of social service that the modern municipality will accord to citizens will be due, in no small measure, to the use of devices like revenue bonds, the sustained development of which will be traceable to the present period. In the past two or three years, greater strides have been made than ever before in the law relating to financing public improvements through the issuance of revenue obligations.

The novelty of this development is evidenced by the fact that a monumental work on the law of municipal corporations is little more than silent on this subject. In the fourth edition of *Dillon on Municipal Corporations*, published in 1890, one of the two chapters devoted to the discussion of municipal charters contains a section eleven pages long entitled, "Limitation on the power to create debts."<sup>93</sup> In this section there is a scanty discussion of the provisions in several State Constitu-

---

93. 1 *DILLON, MUNICIPAL CORPORATIONS* (4th ed. 1890) pp. 197-203. The subject was treated briefly in each of the earlier editions. See 1 *id.* (3d ed. 1881) pp. 157-165; 1 *id.* (2d ed. 1873) pp. 203-208; 1 *id.* (1st ed. 1872) pp. 130-134.

tions limiting the incurring of indebtedness, but there is no treatment in the text of the application of these provisions, to obligations payable from a special fund.<sup>94</sup> The fifth edition of Dillon's treatise, which appeared in 1911, contains a full chapter covering more than one hundred pages entitled, "Constitutional Limitations and Restrictions on Power to Incur Debt."<sup>95</sup> This chapter has a section discussing obligations payable only from a special fund which deals mainly with the law relating to contracts for the construction of local improvements, which provide that the payment for the improvement shall be made from assessments levied against the property specially benefited by the improvement. Revenue obligations issued by a municipality for the purpose of constructing or improving municipally owned enterprises are passed over very briefly.<sup>96</sup> The present trend toward the extension of municipal ownership of public service enterprises, at a time when numerous municipalities are climbing near their constitutional and economic limit of indebtedness, makes municipal obligations payable solely from the revenues of a municipally owned enterprise a timely subject for further research, analysis, and constructive thought.<sup>97</sup>

---

94. The case of *Newell v. People*, 3 Seld. 9 (N. Y. 1852) is cited in a footnote for the proposition: "That a debt may be created by borrowing money, although there be a provision exempting the borrower from liability beyond the property pledged." 1 DILLON, MUNICIPAL CORPORATIONS (4th ed. 1890) p. 198.

95. 1 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) pp. 336-438. The author stated: "The subject is so important, and the decisions construing and applying the constitutional provisions and showing their practical workings are so numerous, that in this edition of the present work we have felt that it was necessary to prepare a new chapter entirely devoted to its consideration." 1 *id.* at 337.

96. The text discusses the holdings in the cases of *Winston v. City of Spokane*, 12 Wash. 524, 41 Pac. 888 (1895) and *Brockenbrough v. Board of City Comm'rs*, 134 N. C. 1, 46 S. E. 28 (1903).

97. On the expanding scope of municipal services, for example in South Carolina, see *Stabler, J.*, in *Park v. Greenwood County*, Opinion No. 13931, filed October 31, 1934 (not yet reported), holding an electric light and power plant is a proper corporate purpose for a county. Cf. *McGowan, J.*, in *Mauldin v. City Council of Greenville*, 33 S. C. 1, 11 S. E. 434 (1890), holding an incandescent lighting system not a proper corporate purpose for a city: "The power given to the city council to issue bonds, so as to bind not only all the taxpayers of the city, but their children as well, is a very high confidence and trust and can be properly exercised for no other purpose than 'for the public use of the corporation,' no matter how great the temptation may be. Without regard to good 'business arrangements,' which may present themselves, such a power must be strictly pursued. . . . We cannot doubt that the purchase of the system producing incandescent lights, so far as it was to furnish lights to private persons, with or without compensation, was not a corporate act of the city council, and binding upon the corporators, but was beyond their authority, as the governing body of the corporation." 11 S. E. 434, 438.